IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs March 11, 2003

STATE OF TENNESSEE v. MICHAEL ANDRAE HOLMAN

Direct Appeal from the Circuit Court for Marshall County
No. 14702 Charles Lee, Judge

No. M2002-01471-CCA-R3-CD - Filed July 23, 2003

Defendant, Michael Andrae Holman, was charged with possession with intent to sell cocaine in excess of 0.5 grams and possession with intent to deliver cocaine in excess of 0.5 grams, in violation of Tenn. Code Ann. § 39-17-417. Defendant was convicted as charged following a jury trial. The trial court merged count two with count one and sentenced Defendant to serve twenty years imprisonment. In this direct appeal, Defendant argues that the evidence at trial was insufficient to support his convictions; that the trial court erred in denying his motion to suppress; and that the sentence imposed is excessive. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and ALAN E. GLENN, J., joined.

Donna Leigh Hargrove, District Public Defender; A. Jackson Dearing, III, Assistant Public Defender; and Curtis H. Gann, Assistant Public Defender, for the appellant, Michael Andrae Holman.

Paul G. Summers, Attorney General and Reporter; Christine M. Lapps, Assistant Attorney General; William Michael McCown, District Attorney General; and Weakley E. Barnard, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

On April 18, 2001, Marshall County sheriff's deputies, as a result of information provided by a confidential informant, arrested Defendant for possession of cocaine with intent to sell or deliver. The confidential informant, Sandra Little Sanders, testified at trial that she saw Defendant on April 17, 2001, at approximately 7:30 p.m., at her friend Trisha Johnson's house. Defendant asked Ms. Sanders to arrange buyers to whom he could sell some crack cocaine. She contacted two or three people that night who bought crack cocaine from Defendant. In exchange, Defendant gave her about $60 worth of crack cocaine, which she smoked that night. Later that same night, Ms. Sanders saw Defendant at Ricky Crutcher's motel room at the Celebration Inn in Lewisburg.

Defendant told Ms. Sanders that he was going to transport some crack cocaine from Nashville to Lewisburg the following day, and she agreed to attempt to sell some of it for him.

At around 8:00 a.m. on the morning of April 18, 2001, Ms. Sanders called Captain Norman Dalton of the Marshall County Sheriff's Department to inform him that Defendant was planning to drive from Nashville to Lewisburg that day to sell crack cocaine. Captain Dalton knew that Defendant drove a teal green 1994 Mustang. In response to Ms. Sanders' telephone call, Captain Dalton went to the Celebration Inn and verified that Ricky Crutcher had stayed at the motel the previous night. Captain Dalton knew Mr. Crutcher and knew that he lived in Lewisburg. Shortly before 11:00 a.m., Defendant called Ms. Sanders and said that he would be in Lewisburg shortly. Ms. Sanders in turn called Captain Dalton. Captain Dalton assigned officers to set up observation points on Highways 50 and 431, two main routes into Lewisburg from Nashville.

Detective Kevin Clark of the Marshall County Sheriff's Department was assigned to watch for Defendant's vehicle at the Highway 50 exit ramp off Interstate 65. He observed two people in a vehicle matching the description of Defendant's vehicle. Detective Clark radioed Captain Dalton, saying that he had spotted Defendant exiting the interstate and there were two subjects in the car. Detective Clark followed the vehicle along Highway 50 into Marshall County. Detective Dalton saw Defendant as he approached the intersection of Highways 50 and 431. He recognized Defendant as the driver and advised Detective Clark and the other officers to stop the vehicle.

The passenger and codefendant, Antione Bridges, was searched, and the police found pills and two bags of cocaine in his jacket pockets. One bag was larger than the other. Police officers also seized two cellular phones and digital scales from the back floor board of Defendant's vehicle. They did not find any other drug paraphernalia in the vehicle or on Defendant or Bridges. Defendant told the police that he was going to Lewisburg to pay a fine. Police officers did not find any money on Defendant. Defendant's driver's license had been issued that day.

Glenn Everett, a forensic chemist with the Tennessee Bureau of Investigation (TBI) crime laboratory, testified that the substance contained in the two bags found on Bridges were cocaine base, a Schedule II controlled substance. The total weight of the two bags was 26.9 grams. The cocaine in the smaller of the two bags weighed 4.08 grams. The pills seized were seven tablets of alprazolam, or "Xanax," a Schedule IV controlled substance.

Codefendant Bridges was charged with possession of alprazolam in violation of Tenn. Code Ann. § 39-17-418. He was indicted along with Defendant on the charges of possession of cocaine in excess of 0.5 grams with intent to sell and possession of cocaine in excess of 0.5 grams with intent to deliver and received a sentence of eleven years. He had also been convicted of possession of cocaine with intent to sell in 1998.

Mr. Bridges testified that he had known Defendant for about eleven years. On April 18, 2001, he rode with Defendant from Nashville to Lewisburg for the purpose of selling crack cocaine. They expected to make more money selling drugs in Lewisburg than in Nashville. Bridges gave a

statement to the police, stating that he bought 5 grams of cocaine in Nashville, which he was taking to Lewisburg to sell. Bridges testified that before leaving Nashville, they stopped at Defendant's apartment to get Defendant's bag of cocaine, which was the larger of the two bags, weighing 22.91 grams. He also testified that the scales belonged to Defendant. When they left Nashville, Defendant had the larger bag of cocaine in his pocket. When they exited I-65 onto the highway, an unmarked police car pulled them over. Defendant handed the bag to Bridges and told him to hold it, explaining that Defendant had a valid driver's license and they would not be searched. Bridges put the bag of cocaine in a different pocket from the one containing his bag.

Motion to Suppress

Defendant contends that the trial court erred in denying his motion to suppress evidence. Specifically, Defendant argues that police officers lacked probable cause to conduct a warrantless search of his vehicle.

At the hearing on the motion to suppress, Captain Dalton testified that he knew Defendant had a history of selling drugs. He also knew that Defendant drove a teal green 1994 Mustang. On April 18, 2001, at around 8:00 a.m., he received a phone call from Ms. Sanders concerning Defendant's drug activities. Captain Dalton testified that he had known Ms. Sanders for eight years. They were personal acquaintances. Ms. Sanders had given information about the criminal activity of others on prior occasions, and Captain Dalton had never found the information provided by her to be inaccurate or false. The information provided by Ms. Sanders had previously led to approximately nine arrests and convictions.

Ms. Sanders told Captain Dalton that she knew Defendant and that she knew Defendant had delivered drugs to Ricky Crutcher at the Celebration Inn in Lewisburg the previous night. Defendant had asked Ms. Sanders to find some buyers to purchase crack cocaine from him. Ms. Sanders told Captain Dalton that Defendant was going to return to Lewisburg on April 18, 2001, with more drugs. Captain Dalton knew Mr. Crutcher to be a narcotics user, and he attempted to verify the information by driving to the Celebration Inn and speaking to the manager of the motel. He discovered that Ricky Crutcher was registered at the motel on April 17, 2001.

In denying Defendant's motion to suppress, the trial court ruled that the State had established the informant's reliability, finding that "the informant has given reliable information over an extended period of time." Additionally, the trial court found that "the informant has provided information that has led to numerous arrests and convictions."

When reviewing a trial court's ruling on a motion to suppress, "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). The trial court's findings of fact are binding upon the appellate court unless the evidence preponderates against those findings. *Id.* The application of the law to the facts, however, is a

question of law that the appellate courts review *de novo*. *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997).

Both the United States Constitution and the Tennessee Constitution protect against unreasonable searches and seizures. U.S. Const. amend. IV; Tenn. Const. art. I, § 7. A warrantless search is presumptively unreasonable. *State v. Hughes*, 544 S.W.2d 99, 101 (Tenn. 1976). Evidence discovered as a result of a warrantless search or seizure is subject to suppression unless the prosecution demonstrates by a preponderance of the evidence that the search or seizure was conducted pursuant to an exception to the warrant requirement. *State v. Keith*, 978 S.W.2d 861, 865 (Tenn. 1998). One such exception to the search warrant requirement is "caused by the need for immediate action under the circumstances." *State v. Parker*, 525 S.W.2d 128, 130 (Tenn. 1975). An automobile may be searched without a warrant if the officer has probable cause to believe that the vehicle contains contraband and if exigent circumstances require an immediate search. *Carroll v. United States*, 267 U.S. 132, 155-56, 45 S. Ct. 280, 286, 69 L. Ed. 543, 552 (1925); *State v. Leveye*, 796 S.W.2d 948, 950 (Tenn. 1990). The inherent mobility of a vehicle creates a conclusive presumption of exigency. *Leveye*, 796 S.W.2d at 950.

The question, therefore, is whether officers had probable cause to believe that Defendant's vehicle contained contraband. In order to establish that probable cause exists to make a warrantless search of an automobile, the State must satisfy the two-prong test established in *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), and adopted by our supreme court in *State v. Jacumin*, 778 S.W.2d 430, 436 (Tenn. 1989). Probable cause requires that there be a basis for the informant's knowledge, and the informant must be credible and her information reliable. *Jacumin*, 778 S.W.2d at 436. Moreover, "independent police corroboration of the information provided by the informant may make up deficiencies in either prong." *State v. Powell*, 53 S.W.3d 258, 263 (Tenn. Crim. App. 2000).

The Tennessee Supreme Court has held that the entire record, including evidence presented at trial, may be considered in reviewing the trial court's ruling on a pretrial motion to suppress evidence. *State v. Henning*, 975 S.W.2d 290, 299 (Tenn. 1998). We conclude that the evidence does not preponderate against the trial court's conclusion that probable cause existed to conduct a search of Defendant's vehicle without a warrant. First, the confidential informant was reliable in that she had provided information in the past that led to several arrests and convictions. Captain Dalton verified a portion of the informant's story by confirming that Ricky Crutcher had been registered at the Celebration Inn. Second, the informant's information was based upon personal knowledge. She saw Defendant in possession of crack cocaine on the night of April 17, 2001. She spoke to Defendant by telephone three separate times on April 18, 2001. Defendant told the informant that he would be driving to Lewisburg from Nashville on April 18, 2001, for the purpose of selling crack cocaine. The trial court did not err by denying Defendant's motion to suppress evidence. Defendant is not entitled to relief on this issue.

Sufficiency of the Evidence

Defendant contends that the evidence at trial was insufficient to support his convictions beyond a reasonable doubt.

When an accused challenges the sufficiency of the convicting evidence, we must determine whether "'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Keough*, 18 S.W.3d 175, 180-81 (Tenn. 2000) (*quoting Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. S.W.2d 560, 573 (1979)). In so determining, this Court must review the evidence in a light most favorable to the prosecution, affording it the strongest legitimate view of the evidence in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *Id*. at 181 (*citing State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997)). Questions regarding the credibility of the witnesses, the weight to be given the evidence, and any factual issues raised by the evidence are resolved by the trier of fact, not this Court. *Bland*, 958 S.W.2d at 659. Furthermore, a guilty verdict replaces the presumption of innocence with a presumption of guilt, which defendant has the burden of overcoming on appeal. *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973).

Defendant was convicted for violating Tenn. Code Ann. § 39-17-417, which makes it an offense to knowingly possess a controlled substance with intent to deliver or sell such controlled substance. The statute requires the State to prove the existence of three elements beyond a reasonable doubt: (1) that Defendant possessed a controlled substance; (2) that the substance contained 0.5 grams or more of cocaine; and (3) that Defendant possessed the substance with the intent to deliver or sell it. *State v. Ross*, 49 S.W.3d 833, 845 (Tenn. 2001).

At trial, TBI chemist Glenn Everett testified that the substance found in bags recovered from Mr. Bridges' pockets was cocaine base and that each bag containing cocaine separately weighed more than 0.5 grams. This evidence is sufficient to establish that the substance contained cocaine in an amount of 0.5 grams or more. Furthermore, Captain Dalton testified that the total amount of cocaine found on Bridges equaled about 270 "dime rocks" or "hits," making the street value of the cocaine about $2,700. Bridges testified that they each intended to sell cocaine in Lewisburg. Sandra Sanders testified that Defendant told her that he would bring cocaine to Lewisburg on April 18, 2001, and asked her to find some buyers. Digital scales used to weigh the cocaine were found in Defendant's vehicle. This evidence is sufficient to establish that Defendant intended to deliver or sell the controlled substance.

Defendant contends that the evidence does not support a finding that he possessed the cocaine. Possession may be actual or constructive. *Ross*, 49 S.W.3d at 845-46. Constructive possession, however, is the ability to reduce the object to actual possession. *Id*. Viewed in a light most favorable to the State, the evidence is sufficient to support a finding that Defendant was in constructive possession of the cocaine. This Court has held that "a defendant's possession of contraband may be inferred from a defendant's ownership or control over a vehicle in which the contraband is secreted." *State v. James A. Jackson*, No. M1998-00035-CCA-R3-CD, 2000 Tenn.

Crim. App. LEXIS 373 (filed at Nashville, May 5, 2000), *no perm. to app. filed*; *see also State v. Timothy Tyrone Sanders*, No. M2001-02128-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 553 (filed at Nashville, July 5, 2002), *perm. to app. denied* (Tenn. Dec. 9, 2002). Moreover, the codefendant testified that Defendant handed his cocaine to him to hide it during the traffic stop. Defendant is not entitled to relief on this issue.

Sentencing

Defendant also contends that the sentence imposed was excessive. This Court's review of the sentence imposed by the trial court is *de novo* with a presumption that the trial court's findings are correct. Tenn. Code Ann. § 40-35-401(d) (1997). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). If the trial court fails to comply with the statutory directives, our review is *de novo* with no presumption of correctness. *State v. Poole*, 945 S.W.2d 93, 96 (Tenn. 1997). The burden is upon the appealing party to show that the sentence is improper. Tenn. Code Ann. § 40-35-401(d) (1997), Sentencing Commission Comments.

When determining or reviewing a sentence, courts must consider: (1) evidence received at trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence offered by the parties on the enhancement and mitigating factors; (6) any statement the defendant wishes to make in the defendant's behalf about sentencing; and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-103(5), -210(b); *Ashby*, 823 S.W.2d at 169. If the trial court has imposed a lawful sentence by following the statutory sentencing procedure, has given due consideration and proper weight to the factors and sentencing principles, and has made findings of fact adequately supported by the record, this Court may not modify the sentence even if it would have preferred a different result. *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

Defendant was convicted of possession of 0.5 grams of cocaine with intent to deliver, a Class B felony. Defendant concedes that the trial court properly classified him as a Range II multiple offender. The sentencing range for a Range II offender of a Class B felony is not less than twelve years and not more than twenty years. Tenn. Code Ann. § 40-35-112(b)(2) (1997). Following a sentencing hearing, Defendant received a sentence of twenty years, the maximum sentence within the range.

Where both enhancement and mitigating factors apply, the trial court is required to start at the minimum sentence within the range, enhance the sentence within the range as appropriate for the enhancement factors, and then reduce the sentence within the range as appropriate for the mitigating factors. Tenn. Code Ann. § 40-35-210(e) (1997). The weight afforded an enhancement or mitigating factor is left to the trial court's discretion provided the trial court complies with the purposes and

principles of the Sentencing Act and its findings are supported by the record. *State v. Zonge*, 973 S.W.2d 250, 259 (Tenn. Crim. App. 1997).

The trial court applied three enhancement factors to Defendant's sentence. The trial court found that Defendant had a history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range, Tenn. Code Ann. § 40-35-114(2) (Supp. 2002), and a previous history of unwillingness to comply with the conditions of a sentence involving release in the community, Tenn. Code Ann. § 40-35-114(9) (Supp. 2002). The trial court also applied enhancement factor (14), that Defendant committed the felony while on probation from a prior felony conviction. Tenn. Code Ann. § 40-35-114(14)(C) (Supp. 2002). The trial court placed considerable weight on enhancement factors (2) and (8) in light of Defendant's young age and extensive criminal history. By the age of twenty-eight, Defendant had accumulated seven prior felony convictions. The trial court found that prior attempts at rehabilitation had failed and concluded that Defendant was "devoid of any potential for rehabilitation." The evidence presented at the sentencing hearing reveals that Defendant has several prior convictions, including drug offenses. For some of his convictions, Defendant received sentences of probation, and on at least one prior occasion, Defendant's probation was revoked for violating the conditions of probation.

In this appeal, Defendant does not challenge the trial court's application of those enhancement factors. Defendant argues that the trial court should have applied the mitigating factor (1), that Defendant's conduct neither caused nor threatened serious bodily injury. Tenn. Code Ann. § 40-35-113(1) (1997). The trial court declined to apply this mitigating factor, emphasizing the substantial amount of cocaine involved in this case. The trial court found that even if this mitigating factor was applicable, it should be afforded very little weight. We agree.

A trial court may not refuse *per se* to consider this mitigating factor where a conviction for possession of cocaine with intent to sell or deliver is based only upon constructive possession and the threat of serious bodily injury is more conceptual than real. *State v. Ross*, 49 S.W.3d 833, 848-49 (Tenn. 2001). The supreme court does not require, however, that trial courts afford this mitigating factor any special significance. *Id.* at 849; *see also State v. Chianti Fuller*, No. M2001-00463-CCA-R3-CD, 2001 Tenn. Crim. App. LEXIS 962 (filed at Nashville, Dec. 28, 2001) *no perm. to app. filed*. In *Ross*, there was a lack of evidence showing that the defendant sold or attempted to sell the drug at the time of the offense. *Ross*, 49 S.W.3d at 848. In this case, there was proof that Defendant intended to sell the cocaine after he arrived in Lewisburg. We conclude that the trial court's determination that the mitigating factor is entitled to very little weight was proper. Defendant is not entitled to relief on this issue.

We conclude that the trial court's findings are supported by the record, and the weight given to the applicable enhancement factors was not improper. Based on the foregoing, the maximum sentence in the range was appropriate.

CONCLUSION

After a careful review of the record, the judgment of the trial court is affirmed.

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THOMAS T. WOODALL, JUDGE